United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7438

To be argued by
AMALYA L. KEARSE

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of Franklin National Bank,
Plaintiff-Appellee,

against

JEAN M. GRELLA, LAWRENCE LEVER, and
LEVER HOLDING CORP.,
Defendants,

JEAN M. GRELLA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION

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- against -	:	
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JEAN M. GRELLA, Defendant-Appellant.	:	

BRIEF OF PLAINTIFF-APPELLEE
FEDERAL DEPOSIT INSURANCE CORPORATION

Preliminary Statement

This brief is submitted by plaintiff-appellee Federal Deposit Insurance Corporation ("FDIC") as receiver of Franklin National Bank ("Franklin"), in opposition to an appeal by defendant Jean M. Grella ("Grella") from a judgment of the United States District Court for the Eastern District of New York, Orrin G. Judd, Judge, in favor of FDIC. The judgment permanently enjoins Grella from terminating a certain lease on the basis of the act of the

Comptroller of the Currency of the United States on October 8, 1974 in declaring Franklin insolvent and appointing FDIC as receiver of Franklin. Judge Judd's opinion, which has not been officially reported, is reprinted at A80-A99.*

Issues Presented

1. Whether the district court had jurisdiction over the subject matter of an action to which FDIC was a party in its capacity as receiver of a national bank.

2. Whether FDIC as receiver of Franklin had standing to bring an action for declaratory and injunctive relief against a purported termination of a lease to which Franklin was a party.

3. Whether the district court was correct in granting summary judgment for FDIC on the grounds (a) that there was no genuine issue of material fact as to the construction of the lease and (b) that the declaration of insolvency of Franklin and appointment of FDIC as receiver by the Comptroller of the Currency did not constitute an event of default under the terms of the lease.

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* References to "A___" are to pages of the Joint Appendix.

Statement of the Case

This is an action commenced by FDIC as receiver of Franklin on February 21, 1975 for a declaratory judgment and injunctive relief against the purported termination of a lease of land (the "Ground Lease") entered into by Franklin and Grella in 1961 for a term to expire in 1981 (A1-A8). Also joined as defendants were Lawrence Lever and Reliance Federal Savings and Loan Association ("Reliance")* who had an interest in the Ground Lease by way of assignments (id.).

On February 21, 1975 FDIC obtained a temporary restraining order, and moved by order to show cause for a preliminary injunction (A103-A106). On March 4, 1975 an evidentiary hearing was held, at which testimony was taken and documents were received in evidence (A31-2; Transcript of Hearing, R13**). After the hearing, the district court continued the temporary restraining order (Transcript of Hearing at 97, R13), and on March 13, 1975 issued an order granting the preliminary injunction (A31-2 - A31-7). Grella appealed from the order granting the preliminary injunction (Notice of Appeal dated April 7, 1975, R23), but her appeal was eventually

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* By an order dated November 11, 1975, Lever Holding Corp. was substituted for Reliance as a party defendant for the reasons stated infra, see first footnote p. 6, and accompanying text (Order dated November 11, 1975, R30).

** References to "R___" are to the documents contained in the record on appeal which are not printed in the Joint Appendix.

dismissed for failure to prosecute (Order dated May 23, 1975, R29).

On March 3, 1975 Grella moved to dismiss the complaint, claiming that FDIC lacked standing to sue and that the district court lacked subject matter jurisdiction (A139-A141). This motion was denied by an order dated April 2, 1975 (A148).

Reliance and defendant Lawrence Lever answered the complaint on March 14, 1975 and March 24, 1975, respectively (Answer of Reliance, R16; Answer of Lawrence Lever, R17). Grella answered the complaint on March 28, 1975 (A19-A21).

No further proceedings were had in this action until February 3, 1976, when FDIC moved for summary judgment (A22-A23). FDIC's motion was based on affidavits, documents, deposition testimony, and facts established at the evidentiary hearing held in March 1975 (A29-A31). Facts relied upon were set forth in FDIC's Statement under Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Rule 9(g) Statement") (A24-A28). Grella did not dispute the facts set forth in FDIC's Rule 9(g) Statement (A82). At the hearing on FDIC's motion for summary judgment Grella expressly rejected the district court's invitation to present further evidence (A83).

In a Memorandum and Order dated June 16, 1976 and filed June 25, 1976, the district court granted FDIC's

motion (A80-A99). On July 6, 1976 final judgment was entered in favor of FDIC against Grella (A100-A102).

Statement of Facts

The Lease and the Building

As of April 4, 1961, Grella was the owner of the fee interest in certain land located in Mineola, Long Island (A24, A31-3). On April 4, 1961, Franklin and Grella entered into the Ground Lease, pursuant to which Grella leased the land to Franklin for a term to expire in 1981, with four options to renew for twenty years each (A9-A16, A24-A25, A31-3).

Prior to executing the Ground Lease, Grella and Franklin entered into a two-page binder agreement which set forth various terms to be included in "* * * a more formal lease to be entered into between the parties * * *" (A39-A40). None of the terms contained in the binder specified or defined events of default (A39-A40, A84). The binder agreement provided that in addition to the specific terms set forth therein,

> "The lease shall * * * contain such other terms and provisions as are customary in a net lease transaction and mutually satisfactory to the parties hereto." (A39)

Grella was represented by attorneys throughout the period of negotiation and execution of the Ground Lease (A32-A38, A84, A143). One of the attorneys who represented

her in connection with the making of the Ground Lease represents her in the present action (A96, A143).

The Ground Lease provides in Paragraph 4 that the "Tenant" has the right to assign the premises without Grella's consent (A10). Beginning in 1962, Franklin entered into several agreements with defendant Lawrence Lever or his wholly-owned corporations (hereinafter referred to collectively as "Lever") pursuant to which Lever ultimately received an assignment of Franklin's interest in the Ground Lease (A25, A31-3, A84-A85).* Lever constructed an office building on the land** and leased space in the building to Franklin for use as a branch banking office (A25, A31-3). Lever's building is now worth $3.5-4.5 million (A25, A52).

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* The assignment to Lever was subject to a collateral assignment to Reliance as security for a mortgage executed by Lever (A85-A86). During the pendency of this action the mortgage was assigned to Lever Holding Corp., which was accordingly substituted for Reliance as a party defendant (Order dated November 11, 1975, R30; A86).

** Paragraph 4 of the Ground Lease gives the right to construct a building on the land to the "Tenant" (A10). Grella was aware that the building was constructed by Lever (A40-4 - A40-5). Paragraph 17 of the Ground Lease also gives the right to exercise the renewal options to the "Tenant" (A15). On January 7, 1965 two of the renewal options were exercised by Lever (A25, A40-5). Every year beginning with 1965 the rent due under the Ground Lease has been paid by Lever (A25, A86-A87).

Based on these facts, it is FDIC's contention that Lever is now the "Tenant" referred to in the Ground Lease. However, that contention was not involved in FDIC's motion for summary judgment and was not considered by the district court in ruling on FDIC's motion (A83, A92).

If Grella is permitted to terminate the Ground Lease, she will take over Lever's multi-million dollar building (A20, A97).

The Claimed Default and the Present Action

Paragraph 10 of the Ground Lease provides in relevant part as follows:

> "If the Tenant * * * shall file or there shall be filed against the Tenant a petition in bankruptcy or arrangement, or Tenant be adjudicated a bankrupt or make an assignment for the benefit of creditors or take advantage of any insolvency act, the Landlord may, if the Landlord so elects, at any time thereafter terminate this lease and the term hereof, on giving to the Tenant five days notice in writing of the Landlord's intention so to do * * *." (A12)

On February 3, 1975, Grella served a notice on Franklin, in care of FDIC as receiver, on Lever and on Reliance, purporting to terminate the Ground Lease as of February 11, 1975 (A17-A18, A27). Grella claimed that the declaration of insolvency of Franklin by the Comptroller of the Currency on October 8, 1974 constituted a default under Paragraph 10 of the Ground Lease (id.).

On February 21, 1975, FDIC as receiver of Franklin commenced the present action for an injunction against Grella's purported termination of the Ground Lease. FDIC's claim that the purported termination is wrongful is based on three contentions:

(1) that none of the events of default described in Paragraph 10 of the Ground Lease has occurred;

(2) that the default provisions in Paragraph 10 of the Ground Lease refer to Lever, the tenant in possession, not to Franklin; and

(3) that even if an event of default occurred, Grella waived her right to terminate the Ground Lease (A4-A7).

Only the first of these contentions was advanced in support of FDIC's motion for summary judgment (A83).

The Events of October 8, 1974

FDIC is an agency of the United States Government organized and existing under and by virtue of an act of Congress (12 U.S.C. §§ 1811-1832) and is expressly authorized by Congress to sue (12 U.S.C. § 1819)(A24, A31-2, A48). On October 8, 1974, the Comptroller of the Currency declared Franklin insolvent and appointed FDIC as receiver of Franklin pursuant to 12 U.S.C. §§ 191 and 1821(c)(A25-A26, A31-2 - A31-3).

When a national bank is declared insolvent and FDIC is appointed receiver, two principal courses of action are available: FDIC may pay claims of depositors up to the statutory maximum out of its insurance fund; or it may enter into a transaction in which a healthy bank purchases assets

and assumes liabilities of the closed bank, if it determines that a risk of loss to its insurance fund will thereby be reduced or averted (A26, A48-A49).

Prior to the declaration of Franklin's insolvency FDIC solicited bids for a purchase and assumption transaction from healthy banks with the hope that banking services to the segment of the public served by Franklin could be continued without interruption (A26, A49-A50). Bids were submitted by four banks (A26, A50). The bid of European-American Bank & Trust Company ("EAB"), which included a premium of $125 million, was the highest bid submitted (id.). FDIC determined that a purchase and assumption transaction with the premium offered by EAB would reduce the risk of loss to FDIC's insurance fund (A26). Consequently, FDIC entered into a Purchase and Assumption Agreement with EAB on October 8, 1974 (A26).

Prior to October 8, 1974, EAB had no branch offices in Nassau and Suffolk Counties, where Franklin had most of its 104 branch offices (A26, A50). An important factor in a bank's willingness to enter into a purchase and assumption transaction is the belief that it will be able to become established in a new territory while providing uninterrupted banking services to customers of the closed bank (A26, A49-A50). In evaluating the prospects of continuity, interested banks review the leases of the to-be-closed bank to

determine whether there are provisions that could result in forfeiture or cancellation (A50). In order to preserve the efficacy of the purchase and assumption alternative, FDIC has an interest in insuring that leases to which closed banks were parties are not wrongfully terminated (A51).

The Purchase and Assumption Agreement entered into by FDIC and EAB was approved by the United States District Court for the Eastern District of New York pursuant to 12 U.S.C. §§ 192 and 1823(e). In re Franklin National Bank, 381 F. Supp. 1390 (E.D.N.Y. 1974). EAB thereupon entered into the leased branch office premises in Lever's building as licensee of FDIC as receiver (A27, A31-4). Since October 8, 1974, EAB has been providing to Franklin depositors, and to the community, the banking services that previously had been provided by Franklin (id.). EAB has advised FDIC as receiver that it desires to take an assignment of Franklin's lease on the branch office space in the building and, in accordance with the Purchase and Assumption Agreement, to buy from FDIC as receiver at appraised value certain improvements and personalty located in the branch office space (id.).

Prior to Grella's purported termination of the Ground Lease, Lever had indicated that he would be willing to consent to an assignment of the branch office space to EAB (A79). However, he has not given his consent and has not

reaffirmed that he will consent (id.). Subsequent to service of the notice of termination, Grella proposed to FDIC that EAB and Grella enter into a "nondisturbance" agreement (A63-A64, A88). FDIC rejected this offer because such an agreement could not insure EAB the right to continued occupancy of the branch office space (A88).

The Motion for Summary Judgment

FDIC moved for summary judgment on the grounds that there are no genuine issues of material fact as to the events that took place or as to the terms of the Ground Lease, and that none of the events of default specified in Paragraph 10 of the Ground Lease has taken place with respect to either Franklin (A28, A50, A92-A93) or Lever (A28, A52-A53).

While Grella opposed FDIC's motion for summary judgment and contended that summary judgment should be entered in her favor (A58, A67, A80), she did not dispute the facts advanced by FDIC in support of its motion (A82). The affidavits submitted by Grella in opposition to FDIC's motion consist largely of conclusory assertions that FDIC lacked standing to sue and that the district court lacked jurisdiction over the subject matter of the action (A55-A58, A65-A67). The record that was before the district court when it decided FDIC's motion for summary judgment included the testimony and

documentary evidence from the preliminary injunction hearing (A82). At the oral argument on FDIC's motion for summary judgment the district court invited Grella to present further evidence (A83). Grella expressly rejected this invitation (id.). At no time during the proceedings in the district court did Grella submit any facts that raised an issue as to the proper construction of Paragraph 10 of the Ground Lease or as to the nature of the events that occurred on October 8, 1974.

The Decision Below

In granting FDIC's motion for summary judgment, the district court accepted the facts set forth in FDIC's Rule 9(g) Statement (A82). The grounds stated by the district court or granting FDIC's motion for summary judgment are as follows:

> (1) FDIC had standing to sue (a) because it might be liable, as Franklin's receiver, for future payments under the terms of the Ground Lease if the Ground Lease were terminated, and (b) because FDIC "has a legitimate public interest in establishing the efficacy of transactions it affects [sic] pursuant to its statutory duty as receiver of a national bank" (A89, A91).

(2) The district court had jurisdiction over the subject matter of the action because 12 U.S.C. § 1819 is an independent grant of jurisdiction over actions to which FDIC is a party in its capacity as receiver of a national bank and because the limitations on the jurisdiction of bankruptcy courts were not applicable (A90, A91-A92).

(3) The construction of Paragraph 10 of the Ground Lease was a question of law (A89).

(4) Even if Franklin were deemed to be the "Tenant" referred to in Paragraph 10 of the Ground Lease, none of the events described in Paragraph 10 had taken place and there was no basis for expanding that paragraph to cover the events that did occur (A92-A98).

Argument

The district court had jurisdiction of this action by virtue of 12 U.S.C. § 1819, which grants federal jurisdiction over every action to which FDIC is a party in its capacity as receiver of a national bank. FDIC had standing to sue because Grella's purported termination of the Ground Lease threatens to harm concrete interests of FDIC (1) in the status of the Ground Lease and (2) in FDIC's ability to carry out its functions as a federal agency responsible for preserving continuity of banking services and for the liquidation and winding up of national banks.

The district court properly granted summary judgment for FDIC on the issue of whether Grella had the right to terminate the Ground Lease, because there is no genuine issue of material fact either as to the meaning of the default terms of the Ground Lease or as to the fact that none of the events of default specified in the Ground Lease has occurred.

I. THE DISTRICT COURT HAD JURISDICTION OF THE ACTION UNDER 12 U.S.C. § 1819.

FDIC brought this action in its capacity as receiver of a national bank. The district court had jurisdiction because under pertinent statutory provisions any action brought by FDIC in such a capacity must be deemed to arise under the laws of the United States and the amount in controversy is not relevant. 12 U.S.C. § 1819; see Federal Deposit Insurance Corporation v. Andersen, 532 F.2d 842, 845 (2d Cir. 1976); cf. Federal Savings and Loan Insurance Corporation v. Fielding, 309 F. Supp. 1146, 1150 (D. Nev. 1969), cert. denied, 400 U.S. 1009 (1971); Federal Reserve Bank of Richmond v. Kalin, 77 F.2d 50, 51 (4th Cir. 1935).

Section 1819 of Title 12, U.S.C. provides in relevant part as follows:

> "* * * All suits of a civil nature at common law or in equity to which the Corporation [i.e., FDIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; * * * except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States." (Emphasis added.)

On its face, this provision grants federal jurisdiction over all actions to which FDIC is a party, excepting only certain actions in which FDIC is a party in its capacity as receiver of a State bank. Section 1819 also expressly provides that any such action automatically involves a federal question, and that the amount in controversy is irrelevant.* Grella's contention that the district court lacked jurisdiction of this action for want of a federal question or the requisite amount in controversy is thus without merit.

Grella contends also that the district court lacked jurisdiction on the ground that Franklin itself

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* Since Section 1819 is a special jurisdictional provision devoted exclusively to FDIC, it is not necessary to inquire whether the requirements of 28 U.S.C. § 1331, the general jurisdictional provision, are fulfilled. Cf. British-American Tobacco Co. v. Federal Reserve Bank of New York, 105 F.2d 935, 936 (2d Cir. 1939); Federal Reserve Bank of Atlanta v. Atlanta Trust Co., 91 F.2d 283, 285 (5th Cir. 1937).

could not have brought the action in federal court. This argument too lacks merit. Nowhere in Section 1819 is there any hint that jurisdiction over an FDIC suit depends on whether the bank for which FDIC is receiver would have had a right to sue.* And certainly none of the cases cited by Grella supports such a proposition. The cases cited at pages 12-13 of her brief deal with the statutory limitations on the jurisdiction of bankruptcy and reorganization courts. Those cases are irrelevant because they do not involve Section 1819 and because the district court in this action was not sitting as a bankruptcy or reorganization court.

Grella's contention that the jurisdictional provisions of Section 1819 are not applicable because FDIC sues as receiver of a national bank rather than in its corporate capacity is defeated by the very terms of Section 1819. That section excepts from federal question jurisdiction only actions in which FDIC acts as receiver of a "State" bank. Thus the section obviously applies to a suit in which FDIC is receiver of a non-State, or national, bank. The cases cited by Grella at pages 20-21 of her brief are irrelevant since they deal neither with federal jurisdiction nor with Section 1819; they deal instead with such unrelated questions as venue and the role of FDIC in enforcing directors' liabilities.

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* Jurisdiction over this action also exists by virtue of other special jurisdictional provisions, viz., 28 U.S.C. §§ 1345 and 1348, which Grella ignores. As in the case of Section 1819, jurisdiction under those provisions is not dependent on assertion of a claim which might have been asserted by Franklin.

FDIC brought this action in its capacity as receiver of a national bank. Under Section 1819 it is clear that a federal question was automatically involved, that the amount in controversy was irrelevant and that the district court had jurisdiction.

II. FDIC HAS STANDING TO SUE TO PROTECT ITSELF FROM RISK OF LOSS AND TO PROTECT THE PUBLIC INTEREST IN FDIC'S ABILITY TO PERFORM ITS STATUTORY FUNCTIONS.

Grella argues that FDIC lacks standing in this action, asserting (1) that FDIC as receiver has no interest in the Ground Lease because Franklin assigned the Ground Lease to Lever before FDIC was appointed as receiver (Grella Brief at 11-16, 21-23), and (2) that the purported termination of the Ground Lease does not create a risk of harm to FDIC (Grella Brief at 16-18). Neither theory has any merit. The purported termination could result in a claim against Franklin's estate, and could impair FDIC's ability to carry out its statutory responsibilities.

A. FDIC Has an Interest in the Ground Lease Because Franklin May Have Continuing Obligations Thereunder.

Despite the fact that Franklin assigned the Ground Lease to Lever, Grella asserts that Franklin may have a continuing obligation to Grella (Grella Brief at 5, 6, 8). In these circumstances, assuming that some

interest in the Ground Lease is a prerequisite to FDIC's standing,* FDIC as Franklin's receiver obviously has standing to sue for a determination of the proper construction of the Ground Lease. See generally Baker v. Carr, 369 U.S. 186, 204 (1962); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937); Beacon Construction Co. v. Matco Electric Co., 521 F.2d 392, 397 (2d Cir. 1975); International Longshoremen's Association v. Seatrain Lines, Inc., 326 F.2d 916, 918-19 (2d Cir. 1964); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure (1975) § 3531 at 177, 185, 224-25.

Paragraph 15 of the Ground Lease provides in part that

> "In the event that the relation of the Landlord and Tenant may cease or terminate by reason of the re-entry of the Landlord under the terms and covenants contained in this lease * * * it is hereby agreed that the Tenant shall remain liable and shall pay in monthly payments the rent which accrues subsequent to the entry by the Landlord, and

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* Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972), on which Grella relies (Grella Brief at 22-23), does not support Grella's contention that such an interest is required. In Caplin the Court held that a Chapter X trustee did not have standing to sue an indenture trustee for its failure to fulfill its obligations to the bondholders of the debtor. There, however, in contrast to FDIC's position in this action, the trustee was not suing for the benefit of the corporate estate or even in his own name, but was suing on private causes of action available to certain debenture holders.

> the Tenant expressly agrees to pay as damages for the breach of the covenants herein contained, the difference between the rent reserved and the rent collected and received, if any, by the Landlord during the remainder of the unexpired term * * * as the amounts of such difference or deficiency shall from time to time be ascertained; * * *" (A14-A15).

Under this provision, if the Ground Lease is terminated, and if "Tenant" refers to the original tenant, Grella could attempt to collect damages from FDIC.* Howard Stores Corp. v. Robison Rayon Co., 64 Misc. 2d 913, 915-16, 315 N.Y.S.2d 720, 722-23 (App. T. N.Y. Co. 1970), aff'd, 36 App. Div. 2d 911, 320 N.Y.S.2d 861 (1st Dep't 1971); Jacob Ruppert Realty Corp. v. Bank of United States, 156 Misc. 93, 98, 110, 281 N.Y.S. 761, 768, 782.

Grella's statement of facts in her brief on this appeal is replete with charges that Franklin continues to be obligated under the Ground Lease. At page 5 she quotes the binder agreement phrase that Franklin "shall, of course [despite any assignment], continue to

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* The purported termination of the Ground Lease threatens further harm to FDIC by virtue of Franklin's lease of office space in Lever's building. Paragraph 11 of the lease on the office space expressly prohibits assignment of that lease by Franklin without Lever's consent (A116). While Lever had indicated a willingness to consent to an assignment to EAB, that indication was given almost two years ago, prior to Grella's purported termination of the Ground Lease. Lever has not yet actually consented, nor has he reaffirmed his willingness to consent.

remain liable for the rent and all of the other obligations on the part of the tenant." At page 6, she states that "no one is contractually liable to Grella on the ground lease except the defunct Franklin." At page 8 she states that "the defunct bank is the only entity contractually liable to her."* Thus, it cannot seriously be disputed that FDIC has a sufficient interest in the status of the Ground Lease to insure that the questions as to the purported termination will be litigated in a concrete adversarial context.

B. FDIC Has Standing To Sue Because of Its Responsibilities As a Government Agency.

FDIC would have standing to sue even if termination of the Ground Lease posed no threat to its pecuniary interests. FDIC is an agency of the Federal Government, and it is settled law that the Government has standing to sue to protect its interests even in the absence of a specific statutory right of action or a proprietary interest. E.g., United States v. Arlington County, 326 F.2d 929, 931 (4th Cir. 1964); see Federal Deposit Insurance

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* In light of these statements, the sentence in Grella's standing argument (Grella Brief at 13) that, "We do not agree that Grella would have any claim against F.N.B. for future rent," is unaccountable. In any event, such a statement is insufficient to insure FDIC against the risk of such a claim.

Corporation v. Sumner Financial Corporation, 451 F.2d 898, 904 (5th Cir. 1972); United States v. City of Glen Cove, 322 F. Supp. 149, 152 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971).

The Arlington County case, supra, involved the question whether the United States had standing to sue for a judgment declaring that a local tax assessed against a naval officer was void under a provision of the Soldiers' and Sailors' Civil Relief Act. The court held that the Government had standing despite the absence of a proprietary interest because of its

> "* * * special interest * * * in the protection and enforcement of its policies and programs with respect to the members of the armed forces * * *." 326 F.2d at 931.

In Federal Deposit Insurance Corporation v. Sumner Financial Corporation, supra, FDIC sought to enjoin an independent money broker from advertising a higher than legal rate of interest in violation of an FDIC regulation. The court of appeals, in reversing dismissal of the complaint, held that FDIC had standing to sue for injunctive relief, even in the absence of specific statutory authorization, in order to discharge its responsibility to regulate interest rates.

Grella's argument that there is no public interest in FDIC's ability to carry out its functions as receiver of

a national bank is without merit. The special interest of the Government in national banks is evident in the cohesive regulatory scheme of Title 12, U.S.C., which regulates national banks from their inception through the liquidation and winding-up of their affairs. The Congressional scheme for liquidation of national banks is exclusive, Cook County National Bank v. United States, 107 U.S. 445, 448 (1882); In re American City Bank & Trust Co., N.A., 402 F. Supp. 1229, 1231 (E.D. Wis. 1975).

FDIC is the government agency charged with the power and duty to implement the Congressional scheme in its capacity as receiver of closed national banks as well as in its corporate capacity. 12 U.S.C. §§ 1821-23; see Federal Deposit Insurance Corporation v. Andersen, 532 F.2d 842, 845 (2d Cir. 1976). Its functions, in winding up the affairs of closed national banks, include adoption of purchase and assumption transactions as an alternative to insurance pay-outs in order to protect FDIC against risk of loss. As set forth in greater detail at pages 33-34 infra, the ability to provide continuity of banking services in new branch office locations is a significant element in the willingness of healthy banks to enter into purchase and assumption transactions. The viability of the purchase and assumption alternative is threatened by unjustified termination of branch office leases. Therefore, under the above authorities, FDIC has standing in this action.

III. SUMMARY JUDGMENT FOR FDIC SHOULD BE AFFIRMED BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE MEANING OF THE DEFAULT TERMS OF THE GROUND LEASE AND BECAUSE NONE OF THE EVENTS OF DEFAULT SPECIFIED HAS OCCURRED.

Paragraph 10 of the Ground Lease, on which Grella's purported termination was based, provides as follows:

> "If the Tenant * * * shall file or there shall be filed against the Tenant a petition in bankruptcy or arrangement, or Tenant be adjudicated a bankrupt or make an assignment for the benefit of creditors or to advantage of any insolvency act, the Landlord may, if the Landlord so elects, at any time thereafter terminate this lease and the term hereof, on giving to the Tenant five days notice in writing of the Landlord's intention so to do * * *." (A12)

Construction of the default terms of this provision is a question of law because the terms are unambiguous and because strict construction is required as a matter of law to avoid forfeiture. The granting of summary judgment for FDIC was correct because none of the events of default specified in Paragraph 10 has occurred with respect to either Lever or Franklin, and there is no basis for enlarging the unambiguous default terms of Paragraph 10.

A. There Is No Genuine Issue of Material Fact Because the Default Terms of Paragraph 10 of the Ground Lease Are Unambiguous, and Strict Construction To Avoid Forfeiture Is Required as a Matter of Law.

Federal Rule 56(c) provides in part that summary judgment may be granted:

> "* * * if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.* * *"

If the words of a contract are unambiguous, their construction is a matter of law for the court. Summary judgment is appropriate where the only issue is as to the proper construction of an unambiguous contract. Cornellier v. American Casualty Co., 389 F.2d 641, 643 (2d Cir. 1968); Kama Rippa Music, Inc. v. Schekeryk, 510 F.2d 837, 841-42 (2d Cir. 1975); Security Options Corp. v. Devilliers Nuclear Corp., 472 F.2d 844, 846 (2d Cir. 1972); Curacao Trading Co. v. Federal Insurance Co., 137 F.2d 911, 913-14 (2d Cir. 1943); see Parish v. Howard, 459 F.2d 616, 618-19 (8th Cir. 1972); La Salle Co. v. Kane, 8 F.R.D. 625, 631 (E.D.N.Y. 1949); Bethlenem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456, 459-60, 141 N.E.2d 590, 592-93 (1957); cf. Brainard v. New York Central Railroad Co., 242 N.Y. 125, 133, 151 N.E. 152, 154 (1926); Marlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 19, 172 N.E.2d 280, 282 (1961); Raleigh Associates v. Henry, 302 N.Y. 467, 473, 99 N.E.2d 289, 291 (1951).

In Brainard v. New York Central Railroad Co., supra, the New York Court of Appeals stated these rules as follows:

> "* * * The construction of a plain contract is for the court. The intention of the parties is found in the language used to express such intention. * * * If the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision of the case. Plain and unambiguous words, undisputed facts, leave no question of construction except for the court. * * *" 242 N.Y. at 133, 151 N.E. at 154.

Similarly, in Morlee Sales Corp. v. Manufacturers Trust Co., supra, the court stated as follows:

> "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. * * * The courts may not by construction add or excise terms, nor distort the meaning of those used and thereby 'make a new contract for the parties under the guise of interpreting the writing.' * * *" 9 N.Y.2d at 19, 172 N.E.2d at 282.

Accord, Raleigh Associates v. Henry, supra, 302 N.Y. at 473, 99 N.E.2d at 291.

Following these principles, in Cornellier v. American Casualty Co., supra, this Court reviewed a provision in an insurance contract that it found to be unequivocal and unambiguous, and affirmed the granting of summary judgment. Accord, Curacao Trading Co. v. Federal Insurance Co., supra, 137 F.2d at 913-14. Similarly, in Kama Rippa Music, Inc. v.

Schekeryk, supra, this Court examined agreements between a singer and a publishing company and found that the critical language of the agreements was clear and unambiguous. It thus affirmed the granting of summary judgment on the singer's counterclaims. In Security Options Corp. v. Devilliers Nuclear Corp., supra, this Court found the language of an underwriting agreement to be plain and unambiguous and thus reversed the district court's denial of a summary judgment motion. See Parish v. Howard, supra, 459 F.2d at 618-19 (summary judgment affirmed on ground that provision of partnership agreement had been correctly held to be clear and unambiguous); La Salle Co. v. Kane, supra, 8 F.R.D. at 631 (summary judgment for plaintiff granted where defenses allegedly based on the contract were contradicted by the unambiguous terms of the contract); Bethlehem Steel Co. v. Turner Construction Co., supra, 2 N.Y.2d at 459-60, 141 N.E.2d at 592-93 (summary judgment affirmed on ground that provision of contract was clear and unequivocal and its construction therefore a question of law).

In the present action, the language of Paragraph 10 of the Ground Lease, invoked by Grella as the basis for her notice of termination, is clear, explicit and unambiguous. That provision (quoted at page 23 supra) gives Grella the right to terminate if "the Tenant"

(1) files a petition in bankruptcy or arrangement,
(2) has such a petition filed against him,
(3) is adjudicated a bankrupt,
(4) makes an assignment for the benefit of creditors, or
(5) takes advantage of any insolvency act.

The unsupported assertions in Grella's brief about what the parties "intended" (Grella Brief at 36-37) are contradicted by the plain and unambiguous language of Paragraph 10. There was no evidence before the district court that suggested that the Ground Lease was not a complete and final integration of the agreement between the parties. In these circumstances evidence as to what Grella claims the parties intended would be barred by the parol evidence rule. Kama Rippa Music, Inc. v. Schekeryk, supra, 510 F.2d at 841-42; Hoh v. Pepsico, Inc., 491 F.2d 556, 557-58 n.2 (2d Cir. 1974); Raleigh Associates v. Henry, supra, 302 N.Y. at 476, 99 N.E.2d at 293; 455 Seventh Avenue, Inc. v. Frederick Hussey Realty Corp., 295 N.Y. 166, 171-72, 65 N.E.2d 761, 762-63 (1946).

The interpretation of the default terms of Paragraph 10 was thus properly determined to be a question of law for the court.

Moreover, unlike some cases involving contracts in which this Court has reversed the granting of summary judgment,

the present action did not present the district court with conflicting possible interpretations of the Ground Lease, because the language of the lease herein must be strictly construed to avoid forfeiture. See Gazlay v. Williams, 210 U.S. 41, 47-48 (1908); Queens Boulevard Wine & Liquor Corp. v. Blum, 503 F.2d 202, 204-205 (2d Cir. 1974); Peirce v. New York Dock Co., 265 F. 148, 152 (2d Cir. 1920); In re Murray Realty Co., 35 F. Supp. 417, 419-20 (N.D.N.Y. 1940); Gillette Bros. v. Aristocrat Restaurant, Inc., 239 N.Y. 87, 92, 145 N.E. 748, 750 (1924); Paddell v. Janes, 84 Misc. 212, 220, 145 N.Y.S. 868, 873 (Sup. Ct. N.Y. Co. 1914). Because there is a public policy against forfeitures, it is well established that clauses permitting termination of leases on events of bankruptcy are strictly construed to disallow termination unless the event that has occurred is one of the events specifically listed in the clause. E.g., In re Imperial "400" National, Inc., 429 F.2d 680, 683 (3d Cir. 1970); In re Murray Realty Co., supra; 4A Collier, Bankruptcy ¶ 70.44 at 542-44 (14th ed. 1971); see In re Takis, 18 F.2d 777 (2d Cir. 1927); cf. Paddell v. Janes, supra, 84 Misc. at 229, 145 N.Y.S. at 878-79.

In re Murray Realty Co., supra, involved a lease of property owned by a church, in which the church was given the right to terminate the lease upon the bankruptcy of the lessee "'or of any successor.'" The original tenant assigned the lease to a company which was subsequently adjudicated bankrupt, and the church sought to terminate the lease. In

determining whether the word "successor" should be interpreted to include assignees, the court noted that elsewhere the lease used the phrase "successors and assigns" and observed that the word "successor" does not necessarily connote an assignee. The court thus held that the church had no right to terminate upon the bankruptcy of the assignee, stating as follows:

> "* * * The law frowns upon forfeitures. Forfeitures should never be decreed unless the language of the instrument sought to be construed so states in clear, unmistakable terms.* * *" 35 F. Supp. at 419-20.

The Imperial "400" case, supra, involved a Chapter X reorganization of the lessee of certain property. The lease provided that the lessor had the right to terminate the lease

> "* * * (1) Upon any general assignment for the benefit of creditors of Imperial [the lessee]
> (2) Or upon the adjudication that Imperial is bankrupt;
> (3) Or upon the sale under execution of the leasehold estate or any part thereof." 429 F.2d at 683.

The court held that the appointment of a trustee to reorganize the lessee under Chapter X of the Bankruptcy Act did not fall within the listed events of default:

> "The above language does not specify the appointment of a trustee in reorganization. * * * [F]orfeiture clauses in leases

> are as a general rule not favored in the law. * * * Since the lease here clearly does not provide for its termination on appointment of a trustee in reorganization or on the filing of a petition in bankruptcy, there is no basis to interpret the lease in this manner." 429 F.2d at 683.*

On the basis of the authorities, therefore, the district court was correct in construing the Ground Lease strictly according to its terms, as a matter of law.

B. None of the Events of Default Specified in the Ground Lease Has Occurred and There Is No Basis for Expanding the Unambiguous Default Terms To Include the Events of October 8, 1974.

None of the events of default specified in Paragraph 10 of the Ground Lease has occurred. Grella does not contend that any of them has occurred with respect to Lever. Nor, apparently, does she contend that any of them has occurred in the normal sense of the words used with respect to Franklin. None of the first three events specified, i.e., those with respect to petitions in bankruptcy or arrangement or adjudications of bankruptcy, occurred and obviously no such event could have occurred; the Bankruptcy Act is,

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* There is no merit in Grella's contention that the Imperial "400" case, supra, conflicts with Finn v. Meighan, 325 U.S. 300 (1944) (Grella Brief at 35). Finn recognized that there was a difference between "'adjudged bankrupt'" and "'adjudged insolvent'", but permitted forfeiture because the appointment of a trustee in a Chapter X reorganization proceeding was an adjudication of insolvency, one of the events of default specified in the lease. 300 U.S. at 303-304.

by its terms, inapplicable to banks. 11 U.S.C. § 22; see First American Bank & Trust Co. v. George, No. 75-1771 (8th Cir., filed July 22, 1976). Nor did the other two events specified occur, since Franklin neither made any assignment for the benefit of creditors nor took advantage of any insolvency act.

What did occur, and what Grella claims constituted a default, was that on October 8, 1974 the Comptroller of the Currency of the United States declared Franklin to be insolvent, and, as required by 12 U.S.C. § 1821(c), appointed FDIC as Franklin's receiver. The Comptroller's declaration was in no sense an adjudication since it was not a judicial act. Bushnell v. Leland, 164 U.S. 684, 685-86 (1897); In re American City Bank & Trust Co., N.A., 402 F. Supp. 1229, 1231 (E.D. Wis. 1975); cf. Adams v. Nagle, 303 U.S. 532, 540 (1938).* When FDIC was appointed receiver of Franklin, Franklin's assets passed into FDIC's exclusive control by operation of law. Anderson v. Cronkleton, 32 F.2d 170, 171

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* The only court action that took place was the approval required by 12 U.S.C. § 192 for the sale of assets by the receiver of a closed national bank; the Comptroller of the Currency was not a party to this proceeding. Even this court approval was not an adjudication of any kind, since it has consistently been held to be merely a ministerial act. Hulse v. Argetsinger, 18 F.2d 944, 945 (2d Cir. 1927); Mitchell v. Joseph, 117 F.2d 253, 254-55 (7th Cir. 1941); Dugger v. Cox, 110 F.2d 834, 836 (6th Cir. 1938); In re Home National Bank, 147 F. Supp. 389, 390-91 (S.D.N.Y. 1956).

(8th Cir. 1929); People v. Nelson, 143 Misc. 3[illegible] 340, 257 N.Y.S. 361, 363 (Sup. Ct. Albany Co. 1932). No action was taken by Franklin, nor was any action by Franklin required, to achieve that result. Thus it is clear that the events of October 8, 1974 were not petitions or adjudications of bankruptcy or arrangement, nor Franklin assignments for the benefit of creditors or taking advantage of any insolvency act.

The language of the Ground Lease in the present action does not specify a declaration of insolvency by the Comptroller of the Currency or the appointment of FDIC as receiver as events that give the landlord the right to terminate the lease. It is only by enlarging the meanings of the words used in the Ground Lease that the events that actually occurred could be construed to fit within the language used.*

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* Since Paragraph 10 of the Ground Lease is unambiguous, there is no room for application of the principle advanced by Grella that contracts should be construed against the draftsman (Grella Brief at 30). Cornellier v. American Casualty Co., 389 F.2d 641, 643 (2d Cir. 1968); see Moran v. Standard Oil Co., 211 N.Y. 187, 196, 105 N.E. 217, 220 (1914). Her contention that strict construction of Paragraph 10 "results in an apparent absurdity" (Grella Brief at 32) is untenable. She apparently bases that argument on the fact that a bank cannot enter bankruptcy. Yet if the Ground Lease is assigned to a non-banking corporation and the word "Tenant" refers to the tenant in possession, obviously there is no "absurdity", apparent or otherwise. FDIC contends that "Tenant" refers to the tenant in possession (see supra, p. 8). However, it is not necessary to decide that question. For purposes of review on this appeal, it is sufficient that there are constructions of the Ground Lease under which Paragraph 10 is not meaningless.

Yet nowhere is the public policy of strict construction to avoid forfeitures more appropriately invoked than here, where the declaration of a forfeiture would seriously restrict the statutory options available to a government agency in its attempt to perform its function in the public interest.

Section 1823(e) of 12 U.S.C. authorizes FDIC to enter into transactions by which a healthy bank purchases assets and assumes liabilities of another bank. Such a purchase and assumption transaction has several advantages to the public, such as avoiding interruption of banking services and maintaining a healthy state of competition in the banking industry.

Banks that are interested in bidding on purchase and assumption transactions are usually banks that have no branches in areas served by the to-be-closed bank (A26). One of the factors such banks take into account is their prospective ability to retain customers of the to-be-closed bank; this ability is adversely affected if there is either a temporal interruption in service or a change in the site of the bank branch (A26, A49-50). Thus in evaluating whether and how much to bid on a purchase and assumption transaction, the prospective bidders review the lease provisions of the bank branches and attempt to assess the likelihood that they will be able to take over the leasehold interests (A50).

In entering into the Purchase and Assumption Agreement involved in the present action, EAB paid $125 million for the opportunity to take over Franklin's business as a going concern (A26, A50). Franklin's value as a going concern consisted in large part of the fact that it had an established network of 104 branches, concentrated in Long Island (id.). EAB had no branches in any part of Long Island (A50). If the default terms of the Ground Lease involved in this action are extended by judicial construction to include the Comptroller's declaration of Franklin's insolvency, EAB may lose branch office space which it reasonably expected to be able to retain.

The question of whether the terms used in Paragraph 10 of the Ground Lease should be extended to include a declaration of insolvency under the National Bank Act is apparently one of first impression in this action. A ruling upholding Grella's purported termination would thus be an invitation to other lessors whose default provisions did not specify the Comptroller's action as a ground for termination, to terminate other leases which have been transferred to EAB pursuant to the Purchase and Assumption Agreement. The compelling public interest considerations in facilitating purchase and assumption transactions require adherence to the long-established public policy of strict construction to avoid forfeitures.

Grella attempts to overcome this policy by arguing that "New York law does not shirk at enforcing a forfeiture provision in a lease absent any fraud or bad faith on the part of the landlord * * * or the absence of a factual insolvency or bankruptcy * * *" (Grella Brief at 28). The cases cited by Grella in support of this contention are inapposite because in each, the clause enforced against the offending party was unambiguous. And in each case the event that occurred was clearly specified in the applicable clause. Grella cites no case in which lease clauses were affirmatively expanded to allow a forfeiture.

Under the guise of applying the principle of reasonable construction of contracts, Grella argues that the Court should rewrite Paragraph 10 to include the Comptroller's declaration of insolvency and the appointment of FDIC as receiver of Franklin (Grella Brief at 31-34, 36-37). But it is settled law that a contract may be reformed only where there has been fraud or mutual mistake. Glen Manufacturing, Inc. v. Perfect Fit Industries, Inc., 299 F. Supp. 278, 281 (S.D.N.Y. 1969), remanded on other grounds, 420 F.2d 319 (2d Cir.), cert. denied, 397 U.S. 1042 (1970); Bailey v. Karolyna Co., 50 F. Supp. 142, 144-45 (S.D.N.Y. 1943); Eastern Air Lines, Inc. v. Trans Caribbean Airways, Inc., 29 App. Div. 2d 379, 382-83, 288 N.Y.S.2d 317, 320-21 (1st Dep't), aff'd, 23 N.Y.2d 709, 243 N.E.2d 756, 296 N.Y.S.2d 153 (1968); see Barash v. Pennsylvania Terminal Real Estate Corp.,

26 N.Y.2d 77, 86-87, 256 N.E.2d 707, 712, 308 N.Y.S.2d 649, 656 (1970).

Grella's arguments in her brief about the supposed purpose of Paragraph 10 and what the parties may have been attempting to accomplish do not raise any question of either fraud or mutual mistake. Accordingly, there was no basis for reforming Paragraph 10, and it was properly construed as written, to disallow termination on the basis of the events of October 8, 1974.

Grella will not be prejudiced by strict construction of the Ground Lease. There is no indication that Lever, who has paid the rent promptly each year since 1965, will be unable to pay the rent in the future. In any event, Lever's building, valued at several million dollars, provides Grella with more than adequate security for the $21,000 per year rental to which she is entitled.

Conclusion

For the foregoing reasons, the judgment appealed from should in all respects be affirmed.

Dated: New York, New York
November 15, 1976

Respectfully submitted,

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ADDENDUM

Statutes Involved

Title 12 of United States Code

§ 1819. Incorporation; powers; seal *

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

First. To adopt and use a corporate seal.

Second. To have succession until dissolved by an Act of Congress.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

Fifth. To appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this chapter or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe, by its Board of Directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

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* As used in this section, "Corporation" is defined as Federal Deposit Insurance Corporation in 12 U.S.C. § 1811.

Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted.

Eighth. To make examinations of and to require information and reports from banks, as provided in this chapter.

Ninth. To act as receiver.

Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter.

Sept. 21, 1950, c. 967, § 2[9], 64 Stat. 881; Oct. 16, 1966, Pub.L. 89-695, Title II, § 205, 80 Stat. 1055.

Title 12 of United States Code

RECEIVERSHIP

§ 191. General grounds for appointment of receiver

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association. As amended Sept. 8, 1959, Pub.L. 86-230, § 16, 73 Stat. 458.

Title 12 of United States Code

§ 192. Default in payment of circulating notes

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. As amended Sept. 8, 1959, Pub.L. 86–230, § 17, 73 Stat. 458.

Title 12 of United States Code

§ 1821. Permanent Insurance Fund. *

(a) Composition; amount of deposit insured; insurance of public funds; aggregate amount of public funds.

(1) The Temporary Federal Deposit Insurance Fund and the Fund For Mutuals heretofore created pursuant to the provisions of section 12B of the Federal Reserve Act, as amended, are consolidated into a Permanent Insurance Fund for insuring deposits, and the assets therein shall be held by the Corporation for the uses and purposes of the Corporation: *Provided*, That the obligations to and rights of the Corporation, depositors, banks, and other persons arising out of any event or transaction prior to September 21, 1950, shall remain unimpaired. On and after August 23, 1935, the Corporation shall insure the deposits of all insured banks as provided in this chapter: *Provided further*, That the insurance shall apply only to deposits of insured banks which have been made available since March 10, 1933, for withdrawal in the usual course of the banking business: *Provided further*, That if any insured bank shall, without the consent of the Corporation, release or modify restrictions on or deferments of deposits which had not been made available for withdrawal in the usual course of the banking business on or before August 23, 1935, such deposits shall not be insured. Except as provided in paragraph (2), the maximum amount of the insured deposit of any depositor shall be $40,000.

(2)(A) Notwithstanding any limitation in this chapter or in any other provision of law relating to the amount of deposit insurance available for the account of any one depositor, in the case of a depositor who is—

(i) an officer, employee, or agent of the United States having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured bank;

(ii) an officer, employee, or agent of any State of the United States, or of any county, municipality, or political subdivision thereof having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured bank in such State;

(iii) an officer, employee, or agent of the District of Columbia having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured bank in the District of Columbia; or

(iv) an officer, employee, or agent of the Commonwealth of Puerto Rico, of the Virgin Islands of American Samoa, or of Guam, or of any county, municipality, or political subdivision thereof having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured bank in the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, or Guam, respectively;

his deposit shall be insured in an amount not to exceed $100,000 per account.

(B) The Corporation may limit the aggregate amount of funds that may be invested or deposited in time and savings deposits in any insured bank by any depositor referred to in subparagraph (A) of this paragraph on the basis of the size of any such bank in terms of its assets: *Provided, however*, such limitation may be exceeded by the pledging of acceptable securities to the depositor referred to in subparagraph (A) of this paragraph when and where required.

(b) Liquidation as closing of bank.

For the purposes of this chapter an insured bank shall be deemed to have been closed on account of inability to meet the demands of its depositors in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors.

(c) Corporation as receiver.

Notwithstanding any other provision of law, whenever the Comptroller of the Currency shall appoint a receiver other than a conservator of any insured national bank or insured District bank, or of any noninsured national bank or District bank hereafter closed, he shall appoint the Corporation receiver for such closed bank.

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* As used in this section, "Corporation" is defined as Federal Deposit Insurance Corporation in 12 U.S.C. § 1811.

(d) Same; powers and duties.

Notwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver to cause notice to be given, by advertisement in such newspapers as it may direct, to all persons having claims against such closed bank pursuant to section 193 of this title; to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; and to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed national banks, except as herein otherwise provided. The Corporation as such receiver shall pay to itself for its own account such portion of the amounts realized from such liquidation as it shall be entitled to receive on account of its subrogation to the claims of depositors, and it shall pay to depositors and other creditors the net amounts available for distribution to them. The Corporation as such receiver, however, may, in its discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Corporation itself or as such receiver by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency.

(e) Same; State banks.

Whenever any insured State bank (except a District bank) shall have been closed by action of its board of directors or by the authority having supervision of such bank, as the case may be, on account of inability to meet the demands of its depositors, the Corporation shall accept appointment as receiver thereof, if such appointment is tendered by the authority having supervision of such bank and is authorized or permitted by State law. With respect to any such insured State bank, the Corporation as such receiver shall possess all the rights, powers and privileges granted by State law to a receiver of a State bank.

(f) Payment of insured deposits.

Whenever an insured bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible, subject to the provisions of subsection (g) of this section either (1) by cash or (2) by making available to each depositor a transferred deposit in a new bank in the same community or in another insured bank in an amount equal to the insured deposit of such depositor: *Provided*, That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured deposits, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination of a court of competent jurisdiction before paying such claim.

(g) Subrogation.

In the case of a closed national bank or District bank, the Corporation, upon the payment to any depositor as provided in subsection (f) of this section, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment. In the case of any other closed insured bank, the Corporation shall not make any payment to any depositor until the right of the Corporation to be subrogated to the rights of such depositor on the same basis as provided in the case of a closed national bank under this chapter shall have been recognized either by express provision of State law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or by any other effective method. In the case of any closed insured bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain his claim for any uninsured portion of his deposit: *Provided*, That, with respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank: but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated: *Provided further*, That the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law.

Title 12 of United States Code

(h) Organization of new bank.

As soon as possible after the closing of an insured bank, the Corporation, if it finds that it is advisable and in the interest of the depositors of the closed bank or the public, shall organize a new national bank to assume the insured deposits of such closed bank and otherwise to perform temporarily the functions hereinafter provided for. The new bank shall have its place of business in the same community as the closed bank.

(i) Same; articles of association and organization certificate; management; acceptance of deposits; funds on deposit with Federal Reserve bank; transaction of business; exemption from taxation.

The articles of association and the organization certificate of the new bank shall be executed by representatives designated by the Corporation. No capital stock need be paid in by the Corporation. The new bank shall not have a board of directors, but shall be managed by an executive officer appointed by the Board of Directors of the Corporation who shall be subject to its directions. In all other respects the new bank shall be organized in accordance with the then existing provisions of law relating to the organization of national banking associations. The new bank may, with the approval of the Corporation, accept new deposits which shall be subject to withdrawal on demand and which, except where the new bank is the only bank in the community, shall not exceed $40,000 from any depositor. The new bank, without application to or approval by the Corporation, shall be an insured bank and shall maintain on deposit with the Federal Reserve bank of its district reserves in the amount required by law for member banks, but it shall not be required to subscribe for stock of the Federal Reserve bank. Funds of the new bank shall be kept on hand in cash, invested in obligations of the United States, or in obligations guaranteed as to principal and interest by the United States, or deposited with the Corporation, with a Federal Reserve bank, or, to the extent of the insurance coverage thereon, with an insured bank. The new bank, unless otherwise authorized by the Comptroller of the Currency, shall transact no business except that authorized by this chapter and as may be incidental to its organization. Notwithstanding any other provision of law the new bank, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.

(j) Same; availability of Corporation's funds; earnings; losses; assumption of deposits of closed bank.

Upon the organization of a new bank, the Corporation shall promptly make available to it an amount equal to the estimated insured deposits of such closed bank plus the estimated amount of the expenses of operating the new bank, and shall determine as soon as possible the amount due each depositor for his insured deposit in the closed bank, and the total expenses of operation of the new bank. Upon such determination, the amounts so estimated and made available shall be adjusted to conform to the amounts so determined. Earnings of the new bank shall be paid over or credited to the Corporation in such adjustment. If any new bank, during the period it continues its status as such, sustains any losses with respect to which it is not effectively protected except by reason of being an insured bank, the Corporation shall furnish to it additional funds in the amount of such losses. The new bank shall assume as transferred deposits the payment of the insured deposits of such closed bank to each of its depositors. Of the amounts so made available, the Corporation shall transfer to the new bank, in cash, such sums as may be necessary to enable it to meet its expenses of operation and immediate cash demands on such transferred deposits, and the remainder of such amounts shall be subject to withdrawal by the new bank on demand.

(k) Same; issuance of capital stock.

Whenever in the judgment of the Board of Directors it is desirable to do so, the Corporation shall cause capital stock of the new bank to be offered for sale on such terms and conditions as the Board of Directors shall deem advisable in an amount sufficient, in the opinion of the Board of Directors, to make possible the conduct of the business of the new bank on a sound basis, but in no event less than that required by section 51 of this title, for the organization of a national bank in the place where such new bank is located. The stockholders of the closed insured bank shall be given the first opportunity to purchase any shares of common stock so offered. Upon proof that an adequate amount of capital stock in the new bank has been subscribed and paid for in cash, the Comptroller of the Currency shall require the articles of association and the organization certificate to be amended to conform to the requirements for the organization of a national bank, and thereafter, when the requirements of law with respect to the organization of a national bank have been complied with, he shall issue to the bank a certificate of authority to commence business, and thereupon the bank shall cease to have the status of a new bank, shall be managed by directors elected by its own shareholders and may exercise all the powers granted by law, and it shall be subject to all the provisions of law relating to national banks. Such bank shall thereafter be an insured national bank, without certification to or approval by the Corporation.

(l) Same; termination.

If the capital stock of the new bank is not offered for sale, or if an adequate amount of capital for such new bank is not subscribed and paid for, the Board of Directors may offer to transfer its business to any insured bank in the same community which will take over its assets, assume its liabilities, and pay to the Corporation for such business such amount as the Board of Directors may deem adequate; or the Board of Directors in its discretion may change the location of the new bank to the office of the Corporation or to some other place or may at any time wind up its affairs as herein provided. Unless the capital stock of the new bank is sold or its assets are taken over and its liabilities are assumed by an insured bank as above provided within two years from the date of its organization, the Corporation shall wind up the affairs of such bank, after giving such notice, if any, as the Comptroller of the Currency may require, and shall certify to the Comptroller of the Currency the termination of the new bank. Thereafter the Corporation shall be liable for the obligations of such bank and shall be the owner of its assets. The provisions of sections 181 and 182 of this title shall not apply to such new banks. (Sept. 21, 1950, ch. 967, § 2 [11], 64 Stat. 884; Oct. 16, 1966, Pub. L. 89-695, title III, § 301 (c), (d), 80 Stat. 1055; Dec. 23, 1969, Pub. L. 91-151, § 7(a) (3), (4), 83 Stat. 375.)

§ 1822. Corporation as receiver—Bond; appointment of agents; payment of fees and expenses *

(a) Notwithstanding any other provision of law, the Corporation as receiver of a closed national bank or District bank shall not be required to furnish bond and shall have the right to appoint an agent or agents to assist it in its duties as such receiver, and all fees, compensation, and expenses of liquidation and administration thereof shall be fixed by the Corporation, and may be paid by it out of funds coming into its possession as such receiver.

Payment of insured deposit as discharge from liability

(b) Payment of an insured deposit to any person by the Corporation shall discharge the Corporation, and payment of a transferred deposit to any person by the new bank or by an insured bank in which a transferred deposit has been made available shall discharge the Corporation and such new bank or other insured bank, to the same extent that payment to such person by the closed bank would have discharged it from liability for the insured deposit.

Recognition of claimant not on bank records

(c) Except as otherwise prescribed by the Board of Directors, neither the Corporation nor such new bank or other insured bank shall be required to recognize as the owner of any portion of a deposit appearing on the records of the closed bank under a name other than that of the claimant, any person whose name or interest as such owner is not disclosed on the records of such closed bank as part owner of said deposit, if such recognition would increase the aggregate amount of the insured deposits in such closed bank.

Withholding payments to meet liability to bank

(d) The Corporation may withhold payment of such portion of the insured deposit of any depositor in a closed bank as may be required to provide for the payment of any liability of such depositor as a stockholder of the closed bank, or of any liability of such depositor to the closed bank or its receiver, which is not offset against a claim due from such bank, pending the determination and payment of such liability by such depositor or any other person liable therefor.

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* As used in this section, "Corporation" is defined as Federal Deposit Insurance Corporation in 12 U.S.C. § 1811.

Title 12 of United States Code

Unclaimed deposits

(e) If, after the Corporation shall have given at least three months' notice to the depositor by mailing a copy thereof to his last-known address appearing on the records of the closed bank, any depositor in the closed bank shall fail to claim his insured deposit from the Corporation within eighteen months after the appointment of the receiver for the closed bank, or shall fail within such period to claim or arrange to continue the transferred deposit with the new bank or with the other insured bank which assumes liability therefor, all rights of the depositor against the Corporation with respect to the insured deposit, and against the new bank and such other insured bank with respect to the transferred deposit, shall be barred, and all rights of the depositor against the closed bank and its shareholders, or the receivership estate to which the Corporation may have become subrogated, shall thereupon revert to the depositor. The amount of any transferred deposits not claimed within such eighteen months' period, shall be refunded to the Corporation.

Sept. 21, 1950, c. 967, § 2[12], 64 Stat. 887.

§ 1823. Corporation monies—Investment *

(a) Money of the Corporation not otherwise employed shall be invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States: *Provided*, That the Corporation shall not sell or purchase any such obligations for its own account and in its own right and interest, at any one time aggregating in excess of $100,000, without the approval of the Secretary of the Treasury: *And provided further*, That the Secretary of the Treasury may waive the requirement of his approval with respect to any transaction or classes of transactions subject to the provisions of this subsection for such period of time and under such conditions as he may determine.

Banking and checking accounts

(b) The banking or checking accounts of the Corporation shall be kept with the Treasurer of the United States, or, with the approval of the Secretary of the Treasury, with a Federal Reserve bank, or with a bank designated as a depositary or fiscal agent of the United States: *Provided*, That the Secretary of the Treasury may waive the requirements of this subsection under such conditions as he may determine: *And provided further*, That this subsection shall not apply to the establishment and maintenance in any bank for temporary purposes of banking and checking accounts not in excess of $50,000 in any one bank, or to the establishment and maintenance in any bank of any banking and checking accounts to facilitate the payment of insured deposits, or the making of loans to, or the purchase of assets of, insured banks. When designated for that purpose by the Secretary of the Treasury, the Corporation shall be a depositary of public moneys, except receipts from customs, under such regulations as may be prescribed by the said Secretary, and may also be employed as a financial agent of the Government. It shall perform all such reasonable duties as depositary of public moneys and financial agent of the Government as may be required of it.

Loans to closed banks

(c) In order to reopen a closed insured bank or, when the Corporation has determined that an insured bank is in danger of closing, in order to prevent such closing, the Corporation, in the discretion of its Board of Directors, is authorized to make loans to, or purchase the assets of, or make deposits in, such insured bank, upon such terms and conditions as the Board of Directors may prescribe, when in the opinion of the Board of Directors the continued operation of such bank is essential to provide adequate banking service in the community. Such loans and deposits may be in subordination to the rights of depositors and other creditors.

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*As used in this section, "Corporation" is defined as Federal Deposit Insurance Corporation in 12 U.S.C. § 1811.

Sale of assets to Corporation

(d) Receivers or liquidators of insured banks closed on account of inability to meet the demands of their depositors shall be entitled to offer the assets of such banks for sale to the Corporation or as security for loans from the Corporation, upon receiving permission from the appropriate State authority in accordance with express provisions of State law in the case of insured State banks. The proceeds of every such sale or loan shall be utilized for the same purposes and in the same manner as other funds realized from the liquidation of the assets of such banks. In any case where prior to September 21, 1950, the Comptroller of the Currency has appointed a receiver of a closed national bank other than the Corporation, he may, in his discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Comptroller of the Currency or to the receiver of any such national bank by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. The Corporation, in its discretion, may make loans on the security of or may purchase and liquidate or sell any part of the assets of an insured bank which is now or may hereafter be closed on account of inability to meet the demands of its depositors, but in any case in which the Corporation is acting as receiver of a closed insured bank, no such loan or purchase shall be made without the approval of a court of competent jurisdiction.

Loans on assets as security

(e) Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or the Corporation as receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writ-

ing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Payment of interest on stock subscriptions

(f) Prior to July 1, 1951, the Corporation shall pay out of its capital account to the Secretary of the Treasury an amount equal to 2 per centum simple interest per annum on amounts advanced to the Corporation on stock subscriptions by the Secretary of the Treasury and the Federal Reserve banks, from the time of such advances until the amounts thereof were repaid. The amount payable hereunder shall be paid in two equal installments, the first installment to be paid prior to December 31, 1950.

Sept. 21, 1950, c. 967, § 2 [13], 64 Stat. 888.

§ 22. Who may become bankrupts

(a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt.

(b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this title. The bankruptcy of a corporation shall not release its officers, the members of its board of directors or trustees or of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States. The status of an alleged bankrupt as a wage earner or farmer shall be determined as of the time of the commission of the act of bankruptcy. July 1, 1898, c. 541, § 4, 30 Stat. 547; Feb. 5, 1903, c. 487, § 3, 32 Stat. 797; June 25, 1910, c. 412, §§ 3, 4, 36 Stat 839; Feb. 11, 1932, c. 38, 47 Stat. 47; May 15, 1935, c. 114, § 1, 49 Stat. 246; June 22, 1938, c. 575, § 1, 52 Stat. 845.

Title 28 of United States Code

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

§ 1348. Banking association as party

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

John J. Sullivan, being duly sworn, deposes and says that he resides at 515 West 54th street, New York, New York 10019

; that on the 15th day of November, 1976, he served the within Brief of Plaintiff-Appellee

on the attorneys for Defendants and Defendant Appellant

herein by mailing ~~x~~ true copies thereof, securely enclosed in a post-paid, properly addressed wrapper, in the mail box under the exclusive care and custody of the United States Postal Service at the corner of Wall Street and Broadway, New York, New York, addressed to said attorneys as follows:

Sprague, Dwyer, Asplandr Tobin
200 Old Country Road
Mineola, New York 11501
(3 copies)

Jerrold Lupoff, Esq.
Wolff + Diamond
100 Garden City Plaza
Garden City, New York 11530
(2 copies)

The above addresses have appeared on the prior papers in this action as the office addresses of said attorneys.

Deponent is over the age of 18 years and not a party to this action.

John J. Sullivan

Sworn to before me this
15th day of November, 1976.

Susan M. Resti
Notary Public

SUSAN M. RESTI
Notary Public, State of New York
No. 31-4564150
Qualified in New York County
Commission Expires March 30, 19